

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 18, 2006 Session

LEON J. ROBINS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2000-B-1140 Walter J. Kurtz, Judge by Interchange

No. M2005-01204-CCA-R3-PC - Filed June 27, 2006

The petitioner, Leon J. Robins, appeals the Davidson County Criminal Court's dismissal of his petition for post-conviction relief from his conviction for first degree premeditated murder and resulting sentence of life imprisonment. On appeal, the petitioner claims that he received the ineffective assistance of counsel, that the trial court lacked jurisdiction to enter the judgment, that the trial court erred in denying the petitioner's trial attorney's motion to withdraw, that the trial court erred in denying the petitioner his right to testify in his own defense, that the trial court erred in allowing prejudicial and irrelevant testimony into evidence, that he was the victim of prosecutorial misconduct, and that the trial court erred in instructing the jury. We affirm the trial court's dismissal of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Wendy S. Tucker, Nashville, Tennessee, for the appellant, Leon J. Robins.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. (Torry) Johnson, III, District Attorney General; and Bret Thomas Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This court on direct appeal summarized the facts supporting the petitioner's conviction:

Around 10:00 p.m. on February 29, 2000, Lyntasha Simmons was inside her apartment at Nashville's Parkway Terrace Apartments when she heard gunshots outside. She looked out her door and saw a person lying on the ground. She had just telephoned the police when an onlooker informed her that it was her brother, Eugene Simmons,

also known as Michael Roach, who had been shot. Simmons dropped the phone, ran to her brother's side, and waited for the police to arrive. The victim was transported by ambulance to Vanderbilt Hospital where he died the next day. Metro Nashville Police Officer Terrence Graves testified that, at 10:08 p.m., he received a dispatch regarding a shooting at that location. He arrived within a minute, saw that the victim had suffered gunshot wounds, and secured the scene.

Amelia Patterson testified that she, along with Pamela Johnson, Tara Johnson, and their cousin, Gerald Johnson, was standing on the porch outside of Pamela's apartment on the night of the shooting. Pamela was on her cell phone talking to a person she referred to as "Tab" when she, referring to the victim, said, "[H]ere he go right here." Pamela told Gerald to bring the victim to her porch. Gerald approached the victim, who was walking just a few feet away, and "kind of like shook him up and brought him over to the porch." The victim "was refusing, but he finally came over there," and Pamela put him on the phone to speak with Tab, who wanted to "talk to him about her money." Patterson testified, "All I heard him say was that he was going to give her her money at 11:30." Patterson said the conversation ended, and "I guess they had told her that they was on their way. They was on the Interstate and she had hung up." Pamela informed her that their discussion concerned "ten-dollars (\$10.00) worth of white," meaning cocaine.

The victim proceeded to walk away when Pamela again instructed Gerald to bring him back to the porch. The victim protested, explaining that he had to go heat up the bag of food that he was carrying. Pamela responded that he could heat it up at her house and, apparently accepting this offer, he began walking toward her porch. Patterson testified that the victim "didn't make it on the porch," however. At this moment, Tab, accompanied by a man, emerged from the parking area and asked, "where her mother-fucking money was." The victim was never given the opportunity to respond to Tab's demand as the man, who was approximately five or six feet away from the victim, pulled a gun from his pocket and shot him. From the witness stand, Patterson identified Tab as the defendant Tabatha White and the gunman as the defendant Leon Robins. Patterson testified that the police attempted to question Pamela Johnson the night of the shooting, but she "wasn't really cooperating" and was "acting like she was hallucinating."

Tara Johnson testified that, in the days preceding the murder, Tabatha White asked her to keep on the lookout for the victim because she had given him “ten-dollars (\$10.00) to do something for her.” She remembered Pamela Johnson talking to White on her cell phone on the night of the shooting and informing her that the victim was present. She testified that Pamela told Gerald Johnson to bring the victim to her, which he did. The victim spoke with White on the telephone and told her that he would pay her at 11:30. As the victim attempted to leave, Gerald forced him to stay, and Pamela told him to heat his food at her house. Before the victim could enter the house, Tabatha White and a man approached. White said “she wanted her mother-fucking money,” and the “dude” shot the victim. Tara heard three gunshots fired and ran into the house. She testified that she did not see either person’s face, but recognized the voice as that of Tabatha White, even though she “didn’t really know [her] that much.”

Pamela Johnson testified that the defendants were at her house “[e]ither one or two days before” the shooting, and Tabatha White gave the victim ten dollars to procure drugs. Although she had known White “[f]or about two or three years,” it was her first encounter with Leon Robins. When the victim failed to return with either the drugs or the money, White was “mad” and instructed Johnson to be on the lookout for him. On the night of February 29, Johnson, standing in her doorway, spotted the victim and called White on a cell phone. Johnson then called the victim over and put him on the phone with White. The phone cut off and the victim proceeded to leave. She called White back and had her cousin, Gerald Johnson, bring the victim back to the front of her house. Moments later, Robins shot the victim and White said “something to him about her money.” Johnson testified that she thought the defendants were “just going to beat him up or something.”

Detective Danny Satterfield of the Metro Police Department testified that, before trial, Pamela Johnson had told him that she was inside her house when the shooting occurred and could not identify the shooter. At Tabatha White’s bond hearing, Johnson again stated that she did not witness the shooting and denied making phone calls to White prior to the shooting.

Saying that she had been scared, Pamela Johnson admitted to lying to the police on the night of the shooting by telling them both that she did not know who shot the victim and that Tabatha White had not been there, as well as lying at White’s bond hearing.

According to Johnson, White had called her and said “just keep the cool and . . . everything will be all right.” At some point, however, Johnson changed her story and identified both defendants from photographic lineups, explaining that she “just had to tell the truth” and her “kids don’t need to be having a momma that is getting in trouble for something she didn’t do.” On cross-examination, it was elicited from Johnson that the police “coerced” her regarding her testimony. However, neither the details of the alleged coercion, nor its alleged effect, was revealed.

Detective Satterfield testified that, during his investigation, he spoke with Amelia Patterson who told him that “she was there and witnessed the shooting incident.” On March 9, 2000, he showed her a photographic lineup of suspects from which she identified Robins without any uncertainty as the man who shot the victim. From another photographic lineup, she identified Tabatha White as the woman who was with Robins. That same day, Detective Satterfield spoke with Tara Johnson, who also witnessed the shooting, and showed her identical photographic lineups.

Because of the extensive questioning of Tara Johnson’s selections from the male and female photographic lineups, we will set out the details of this matter. The record on appeal includes a copy of each, that of the females depicting Tabatha White as photograph number 4 and that of the males depicting Leon Robins as photograph number 6. On the form that corresponds to the male lineup, she identified “Picture No. 4, White, Tabatha” as “somebody she knew,” explaining, “This is Tab. Don’t know if Tab was there.” However, she made no marks on the form corresponding to the female lineup. Thus, the form that was filled out for the male lineup actually refers to the female lineup, and no form was filled out by the witness corresponding to the male lineup.

Victoria Shelton, who lived in the apartment complex where the shooting occurred, testified that, on that night, she was inside her house and overheard Gerald Johnson tell the victim “that he was going to give him something.” When the victim explained that he would pay him later that night, Gerald Johnson “kept saying no.” “A few seconds, a couple of minutes” later, she heard four gunshots, went outside, and saw the victim on the ground. She saw a white Chevrolet Cavalier leave the parking lot, and she said that a “light-skinned male black” usually drove that particular car.

Harold Overton testified that he lived in Apartment U-166 at the Knollcrest Apartments. On March 3, 2000, Detective Clifford Mann, responding to an anonymous CrimeStoppers tip, visited Overton to question him about Tabatha White, who lived in nearby apartment U-162. He told Detective Mann that he was familiar with White and her occasional visitor, Leon Robins, whom he identified from a photographic lineup. A few nights earlier, according to his testimony, he witnessed Robins engaging in the following conversation:

There was [sic] about three or four guys that were talking, and then one guy walked up and he said Leon, man, . . . they are looking for you And then he said, like, well, I don't give a fuck, you know, there is more than one Leon . . . and then he said besides that, they don't know my last name[.]

On cross-examination, Overton testified that he was fifteen to twenty feet away from the conversation and that, although it was dark, the area was well lit by a streetlight.

Dr. Bruce Levy, the Davidson County Medical Examiner, testified that the victim was shot twice. One bullet entered the middle of the forehead and the other entered the back of the left thigh. As to the head wound, Dr. Levy concluded that the barrel of the gun was greater than two feet away when fired. Based on toxicology tests, he testified that the victim was under the influence of cocaine at the time of the incident.

Cody Sims, customer operations manager for Cricket Communications, a cellular telephone company, testified that Pamela Johnson was a customer on February 29, 2000, and that her cell phone number was 615-485-5158. Laurie Turner, a legal affairs coordinator for Powertel, another cellular telephone company, testified that, according to company records, Tabatha White was a customer on February 29, 2000, and, on that day, three consecutive incoming calls were received on her cell phone from Pamela Johnson's 615-485-5158 phone number. The respective times for those three calls were 9:52, 9:53, and 9:58 p.m.

Marion Tucker testified on behalf of Leon Robins that, on the night of February 29, he, apparently, was a witness to the confrontation with the victim, saying, "I seen this female come up [and] assault [the victim] over ten-dollars (\$10.00), and I turned

around and ran, and that is all I seen.” He stated that the woman who said “Where my ten dollars at?” was holding a gun.

Robins’ sister, Nicole House, testified that she was with him at their mother’s house on the night of the shooting and, when she left “[b]etween 10:15 and 10:30,” he was still there. On cross-examination, she testified that, although she had learned at the preliminary hearing the time and date of the murder for which her brother had been charged, she did not inform the police that she had been with him at the time of the killing. Martinique Robins, another sister of the defendant, also testified that, on the night of the murder, he still was at their mother’s house when she departed, sometime “close to 10:30.” Like her sister, she did not contact the police about her brother’s whereabouts on the night and time of the shooting. Robins’ mother, JoAnn Hardy, testified that her son was at home when she returned from work shortly after 11:00 p.m. on the night of the shooting.

Tabatha White’s mother, Raven White, testified that her daughter was with her at her house at the time of the shooting. On cross-examination, she admitted that at her daughter’s bond hearing, she stated that she went to bed around 9:00 p.m. on the night of the shooting. White’s father, James White, testified that he usually goes to bed at “7:30 or 8:00” and that, on the night of the shooting, his daughter “was there when I went to bed. She was there when I got up. Other than that, I can’t tell you nothing.” But, he testified, if she were to have left while he was asleep, the dogs would have awakened “everybody just about in the neighborhood.”

State v. Leon J. Robins and Tabatha R. White, No. M2001-01862-CCA-R3-CD, Davidson County, slip op. at 1-5 (Tenn. Crim. App. Mar. 20, 2003) (footnotes omitted). This court affirmed the petitioner’s conviction and sentence. Id. at 1.

On April 1, 2003, the petitioner filed a petition for post-conviction relief alleging myriad constitutional violations. The trial court appointed the petitioner counsel, and the petitioner filed an amended petition for post-conviction relief.

At the post-conviction hearing, the petitioner’s trial attorney testified that he was appointed to represent the petitioner. The attorney said he hired a private investigator to help him prepare the petitioner’s defense. He said the investigation revealed that the police initially considered someone named “Twenty” as a suspect in the murder. He said his defense strategy at the trial was that the petitioner had an alibi. He said he also introduced testimony at the trial from a witness who said the petitioner’s co-defendant shot the victim. The attorney said he met with the petitioner to discuss the

case ten times before the trial. The attorney acknowledged that the petitioner's co-defendant, Pamela Johnson, testified against the petitioner. He said he could not remember, though, whether he filed a motion demanding to know if the state had an agreement with Ms. Johnson in exchange for her testimony.

The attorney testified that he filed a motion to suppress the petitioner's identification based upon improper procedures used during the photograph line-up. He said he recalled arguing about the issue of hair length as it related to the line-up.

The attorney testified that on the day of the trial, Judge Blackburn, who was scheduled to preside over the petitioner's trial, became ill and that Judge Kurtz presided over the case by interchange. The attorney said that he was not asked to approve of this arrangement, that the petitioner objected to it, but that the attorney failed to inform the court of the petitioner's objection because he thought "it was quite advantageous that Judge Kurtz was sitting."

The attorney testified that the petitioner's name was originally brought to the attention of the police based upon an anonymous 9-1-1 call. He said, however, that he failed to attempt to discover the identity of the caller.

The attorney testified that he filed an amended notice of alibi which included the names of four witnesses. He acknowledged that one of the witnesses was Ms. Christine McHenry. He admitted that he had subpoenaed Ms. McHenry to testify at the trial but said that she was ill on the day of the trial and was not available. He said he intended to call Ms. McHenry because she was the petitioner's grandmother, "and I think she was living in the house and would have supported the alibi defense."

The attorney acknowledged that during the trial, he did not ask any of the witnesses about "Twenty's" reputation for violence. He said he also did not ask whether "Twenty" "met the description of the shooter."

The attorney testified that he did not object at the trial on the grounds of inadmissible hearsay to the testimony of Harold Overton. The attorney admitted failing to object during closing arguments to the state's mischaracterization of Mr. Overton's testimony.

The attorney testified that the petitioner filed a complaint against him with the Board of Professional Responsibility. He said, however, that he did not bring this filing to the court's attention.

The attorney testified that his investigation revealed that Detective Mann threatened to take away the children of the petitioner's co-defendant, Pamela Johnson, if she did not cooperate with the police and testify against the petitioner. He acknowledged, however, that he did not cross-examine Pamela Johnson regarding Det. Mann's threat.

The attorney testified that after the state introduced photographs into evidence showing the petitioner with long hair consistent with witness testimony about the shooter, he discussed with the petitioner the propriety of introducing into evidence some of the petitioner's prior mug shots showing the petitioner with short hair. The attorney said he advised the petitioner that introducing the photographs into evidence was not a good idea because it would indicate to the jury that the petitioner had a lengthy criminal record. He said, however, that the petitioner insisted on introducing the photographs depicting his short hair. The attorney admitted not asking the court for a limiting instruction on the introduction of the mug shots.

The petitioner's attorney testified that he discussed the petitioner's right to testify with him. He said he did not actually prepare the petitioner to testify because alibi was the main defense. Concerning the petitioner's alibi defense, the attorney testified that he did not object to the trial court's alibi jury instruction. The petitioner's attorney also testified that he did not request the trial court to give the jury a specific instruction of how it should weigh direct versus circumstantial evidence.

The petitioner's attorney testified that he represented the petitioner on appeal. He said he did not consult the petitioner regarding his appeal because his relationship with the petitioner had deteriorated to the point that the petitioner threatened him.

On cross-examination, the petitioner's attorney admitted that no discovery documents existed stating that "Twenty" committed the murder. Rather, he said the documents reflected that "Twenty" was someone who could have been involved. The petitioner's attorney acknowledged that he concentrated his investigative resources on finding people to establish the petitioner's alibi.

On redirect examination, the petitioner's attorney admitted that the discovery file contained the name of Antonio Williams who reportedly stated that a female shot the victim. The attorney admitted he did not call or attempt to subpoena Mr. Williams as a witness at the trial.

Roger Clemons testified that he was the private investigator hired by the petitioner's attorney. Mr. Clemons said that after his investigation was complete, he provided the petitioner's attorney with the information that he collected. He said that he located a person with the street name of "Twenty" and that the person's actual name was Kenneth Frazier Taylor. Mr. Clemons said he interviewed Mr. Taylor who admitted he was also known as "Twenty." He said "Twenty" initially denied knowing the petitioner but later admitted that he had fathered a child with the petitioner's sister, Nicole House. Mr. Clemons said "Twenty" also admitted driving a white car during the time of the shooting. Mr. Clemons said he also interviewed Ms. House who said that "Twenty" was known in the community as an armed drug dealer who hung around the area of the shooting.

Mr. Clemons testified that the only alibi witness who was with the petitioner at his home the entire night was Ms. McHenry, a witness not called by the petitioner's attorney. Mr. Clemons said Ms. McHenry was not related to the petitioner but was only residing in the home during the time of

the shooting. Mr. Clemons acknowledged serving a subpoena on Ms. McHenry for her to testify at the trial.

Mr. Clemons testified that as a part of his investigation, he learned that Detective Satterfield was coaching one of the trial witnesses, Amelia Patterson. Mr. Clemons said he interviewed the witnesses who overheard the coaching incident and provided the information to the petitioner's attorney.

Mr. Clemons testified that the length of the petitioner's hair was an issue in the case. He said the petitioner's mother told him that she had allowed the petitioner to move home before the shooting but only if he cut his hair and that the petitioner cut his hair and returned home. Mr. Clemons said this contrasted with the descriptions of the shooter's hair as long hair with a ponytail.

Mr. Clemons testified that he interviewed Amelia Patterson who told him the perpetrator had dark skin. Mr. Clemons said, however, that the petitioner was light-skinned because his mother was Caucasian. Mr. Clemons also said he was unable to link the petitioner with any cars white in color and matching the description given by the eyewitnesses. He said he provided this information to the petitioner's attorney.

Mr. Clemons testified that he was prepared to testify at the trial if needed. He said, however, that the petitioner's attorney did not call him to testify.

Metropolitan Police Department Identification Section Supervisor Alethia Lewis testified that she was asked by the petitioner's post-conviction attorney to bring mug shots of Kenneth Frazier Taylor, "Twenty," to the post-conviction hearing. The petitioner introduced the mug shots as an exhibit.

Metropolitan Police Department Detective Danny Satterfield testified that he investigated the petitioner's case. Det. Satterfield said he did not recall the shooter's length of hair being an issue in the case. He admitted that the witnesses described the shooter as driving a white car. Det. Satterfield said he did not recall having a conversation with Amelia Patterson before her testimony at the preliminary hearing. He said he also did not recall coaching Ms. Patterson as to what description to give of the shooter. He said, however, that he did not tell anyone what to say during the preliminary hearing.

Det. Satterfield testified that he recalled being asked about manufacturing evidence in another case during his testimony at the petitioner's trial. He said he was unsure of whether the discussion took place outside the jury's presence. He said the case in which he was accused of manufacturing evidence was the Spurlock case. See State v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993).

Metropolitan Police Department Detective Clifford Mann testified that he investigated the petitioner's case. He said his initial report indicated witness statements to the effect that the suspect "left the scene driving a white Chevrolet Celebrity with green drive-out tag in the rear window. The

suspect that did the shooting go by the name of Twenty (Dollars).” He said multiple witnesses stated that the suspect and a black female got into a white car. Det. Mann said that to his knowledge, the investigators were unable to link the petitioner to either a white car or the street name “Twenty.”

Christine McHenry testified that she lived with the petitioner and his family at the time of the murder. Ms. McHenry said that on the night in question, the petitioner was sick, lying on the couch. She said one of the petitioner’s sisters went to the store to get him some medicine while the other one stayed with him. Ms. McHenry said she was at home the entire night. She said that when she went to bed, the petitioner was asleep on the couch and that when she awoke in the morning, the petitioner was in the same position, still asleep on the couch. She said she did not hear the petitioner leave the house during the night.

On cross-examination, Ms. McHenry said she still lived with the petitioner’s mother. She said the petitioner’s mother drove her to court and told her she would be testifying at the post-conviction hearing as a witness. She said she talked to the petitioner’s mother the day before the hearing about the petitioner’s case.

Joanne Roberson testified that she is the petitioner’s mother. Ms. Roberson said that on the day of the shooting, both of her daughters and Ms. McHenry were at home. She said Ms. McHenry used to be her neighbor until Ms. McHenry’s husband died. She said she let Ms. McHenry stay with her because there was no one else to take care of Ms. McHenry. Ms. Roberson said she had not attempted to influence the testimony of Ms. McHenry.

Ms. Roberson testified that she was familiar with “Twenty” because he was her grandson’s father. She said “Twenty” had a reputation in the community as a violent drug dealer. She said that at the time of the murder, “Twenty” had long hair. Ms. Roberson said she was “absolutely positive” the petitioner had short hair at the time of the murder because she made him cut his hair before he moved back home. She said the petitioner cut his hair and moved back home before the murder.

Nicole House testified that she is the petitioner’s sister. She said that the day of the murder was the only day her brother was sick when she also left to get him medicine. Ms. House said “Twenty” was driving a white Sunfire during the time of the murder. Ms. House testified that at the preliminary hearing, she overheard Det. Satterfield tell Amelia Patterson, “This is what you going to get on this stand and say and this is what I need you to get up here and say.” She said Det. Satterfield then gave the petitioner’s description to Ms. Patterson. She said Ms. Patterson responded that she did not know the petitioner and that she would not take the stand and say that she did. Ms. House said she entered the courtroom and told the petitioner’s preliminary hearing attorney¹ about the conversation. Ms. House said that at the time of the murder, the petitioner had short hair.

Martinique Robins testified that she is the petitioner’s sister. She said she also heard Det. Satterfield coaching Amelia Patterson outside the courtroom before the preliminary hearing. She

¹The petitioner’s attorney at the preliminary hearing was not the trial attorney.

said he told Ms. Patterson that the petitioner was a “light-skinned male, 120 pounds.” Martinique Robins also testified concerning the reputation and hair length of “Twenty” and the type of car driven by “Twenty” similarly to Ms. House.

The petitioner testified that his attorney never discussed a line of defense with him before the trial. He said, “That’s one reason I filed a complaint with the Board of Professional Responsibility” The petitioner said he wanted his attorney to file a motion to suppress the line-up identification procedures because he was “the biggest person on the photo line-up. You know, I st[u]ck out above any other dark-skinned or black male.” The petitioner said that although his attorney argued a motion to suppress the line-up on the day of trial, the attorney did not raise that issue.

The petitioner testified his attorney told him that the trial judge, Judge Blackburn, was sick and that they would either have to agree to a continuance or agree to Judge Kurtz sitting by interchange. The petitioner said he told his attorney that he wanted Judge Blackburn because she knew the case better than Judge Kurtz and that he would take a continuance. He said, however, that thirty minutes later he was taken to the courtroom and the trial began.

The petitioner testified that his attorney never discussed with him the advantages and disadvantages of his testifying at the trial. He said the attorney only told him that if he testified, the state would bring up his prior record. The petitioner said he would have testified at the trial if he had been given the opportunity. The petitioner said his attorney never discussed his appeal with him. He said that he wanted his attorney to raise the issue on appeal about the interchange of judges but that his attorney failed to do so.

Davidson County Assistant District Attorney General Brett Gunn testified that he was assigned to prosecute the petitioner. He said that regarding the testimony of Pamela Johnson, he did not make a deal with Ms. Johnson in exchange for her testimony. He said he only told her that the district attorney’s office would look at her case after the trial of the petitioner and Tabatha White. Mr. Gunn admitted that although Ms. Johnson was originally indicted for felony murder, she pled guilty to a lesser offense after the petitioner and Ms. White were convicted and was sentenced to four years on probation.

After considering the evidence and the arguments of counsel, the trial court issued an order denying the petitioner post-conviction relief and dismissing the petition. In its order, the court stated

Petitioner contends that trial counsel was ineffective by not trying to show that a person named Kenneth Taylor, otherwise known as “Twenty,” was perhaps the killer. “Twenty” had been identified as a possible suspect in some of the early police reports, although the police reports failed to indicate why “Twenty” was considered a suspect. The petitioner was unable to produce a single witness that identified “Twenty” as the killer or even put him at the scene. The

best petitioner could do was to put on witnesses who said that “Twenty” sometimes drove a white car and that a white car was seen leaving the scene of the shooting. There was also testimony that “Twenty” had long, braided hair at the time of the shooting. There was no proof put on as to the color of the car driven at the time by the petitioner and his co-defendant, nor was there any proof of a relationship between “Twenty” and the co-defendant, Tabatha White. The Court notes that twice during the jury trial, counsel for the petitioner attempted to elicit testimony about “Twenty” being a suspect only to be cut-off by the State’s hearsay objection. Trial counsel was given authorization to hire an investigator The investigator found no admissible evidence or a witness to connect “Twenty” to the shooting.

The petitioner has failed to produce admissible evidence showing that “Twenty” was the killer. There was an evidentiary disconnect between petitioner’s speculation and what was shown. As the Court’s previously mentioned, Black [v. State], 794 S.W.2d 752 (Tenn. Crim. App. 1990)] requires proof, not speculation.

. . . .

Petitioner complains that there was no excuse for trial counsel not presenting Christine McHenry . . . as a further alibi witness. At trial, the mother and sister testified as to the petitioner’s alibi, but Ms. McHenry was not called because she was home sick. Her testimony at the post-conviction hearing was mostly redundant to the testimony of the mother and sister. Further, when Ms. McHenry testified, she was confused and forgetful, and the proof does not show that her testimony would have been any better at the trial.

An important State’s witness at trial was Amelia Patterson. The petitioner contends that trial counsel had witnesses who could testify that prior to the preliminary hearing, Detective Satterfield was overheard telling Ms. Patterson whom to identify as the shooter. Ms. Patterson was not called to testify at the post-conviction hearing, and Detective Satterfield denied that the incident ever occurred.

Petitioner contends that the cross-examination of the severed co-defendant, Pamela Johnson, should have been more vigorous. Petitioner contends that it should have been emphasized that Ms. Johnson faced a possible life sentence. The cross-examination could have been more explicit; however, the jury knew that Ms. Johnson

was charged in the same indictment and that the charges were still pending, and an appropriate jury instruction was given

The petitioner contends that his trial lawyer failed when he did not discover the State's "deal" with Ms. Johnson. The proof shows that there was not a "deal" between the State and Pamela Johnson. . . .

Petitioner offered proof from his mother and sister that he had short hair at the time of the shooting. There was proof at trial regarding the issue of hair length, and this is discussed in the appellate decision. The eyewitnesses described [the petitioner], at the time of the shooting, as having long hair. Petitioner now wants to contend that trial counsel failed to offer the family members who provided the alibi defense on the issue of his hair length. The jury rejected the alibi defense, and this Court has no reason to believe that the hair length testimony from the same witnesses would not suffer the same fate. . . .

The petitioner complains that the trial lawyer did not seek the identity of the informant who called Crime Stoppers. No proof was presented as to how this information could have helped the petitioner at trial.

Petitioner complains that he wanted the defense lawyer removed before trial and that this motion was denied. He says he then filed before trial a complaint with the Board of Professional Responsibility. He contends that since he filed the complaint before trial, trial counsel had a conflict. Trial counsel testified that he had no memory of a complaint being filed before or during the trial. The Court credits this testimony. However, even if a complaint was filed, a criminal defendant cannot effectuate the removal of appointed counsel by filing a complaint with the Board. The petitioner had no right to choose his own appointed counsel.

Petitioner complains that trial counsel did not object to the testimony of Harold Overton on hearsay grounds. The Court believes that the statements of the petitioner were admissible hearsay. See T.R.E. 803(1.2). The statement by the petitioner was ambiguous but could have been interpreted as indicating consciousness of guilt. It was relevant. T.R.E. 401.

Petitioner's trial attorney had a cogent explanation as to why he recommended to the petitioner that he not testify at trial.

The petitioner complains that the trial attorney filed a late motion to suppress the photo identification. The Court heard the motion, even though filed late, and denied it as the photo line-up was fair. The appellate court affirmed.

On the day of the jury trial, Judge Blackburn was sick with the flu. The undersigned Judge sat by interchange. The petitioner now asserts that he had the right to veto the interchange of judges. No such right exists. See T.C.A. §§ 17-2-205 and 206.

The petitioner testified that his trial lawyer had no strategy. This is just not true. The defense was alibi.

Trial counsel perhaps could have done a better job. There may be untied loose ends on the hair length and the alibi, but both issues were raised, witnesses testified, and the State's proof was put to "the crucible of meaningful adversarial testing." The petitioner even had a hired professional investigator. The petitioner did not have perfect counsel, but he had adequate counsel and received a fair trial.

The Court has considered all the allegations contained in the petition and amended petition and has determined that they are without merit. This includes the allegations regarding the appeal. The petition for post-conviction relief is dismissed.

As previously stated, the petitioner contends that he received the ineffective assistance of counsel, that the trial court lacked jurisdiction to hear his case, that the trial court erred in denying his attorney's motion to withdraw, that the trial court denied him his right to testify in his own defense in violation of the constitution, that the trial court committed a constitutional error in allowing into evidence prejudicial hearsay testimony, that the state engaged in prosecutorial misconduct, and that the trial court erred in instructing the jury. The state contends that the petitioner did not receive the ineffective assistance of counsel, that the trial court did not lack jurisdiction, and that the petitioner has waived his remaining issues because he failed to raise them on direct appeal. We agree with the state.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner contends that he received the ineffective assistance of counsel. He claims he is entitled to relief because his attorney (1) failed to investigate his case adequately and failed to

present crucial defense witnesses at the trial, (2) failed to consult with him adequately, (3) failed to file a pre-trial motion to determine the extent of a deal given to a prosecution witness in exchange for her testimony, (4) failed to file a timely motion to suppress his identification, (5) agreed without the petitioner's consent to have another judge hear the petitioner's case by interchange, (6) failed to file a motion to obtain the identity of a caller to Crime Stoppers who identified the petitioner as the shooter, (7) failed to object to prejudicial hearsay, (8) failed to advise the court that the petitioner had filed a complaint with the Board of Professional Responsibility against him, (9) failed to cross-examine some prosecution witnesses effectively, (10) improperly admitted some of the petitioner's prior mug shots into evidence, (11) failed to present evidence of other suspects, (12) failed to impeach Detective Satterfield properly, (13) failed to introduce at the trial Detective Satterfield's coaching of witness Amelia Patterson at the preliminary hearing, (14) failed to advise the petitioner properly of his right to testify, (15) failed to object to an improper alibi instruction, (16) failed to request a jury instruction, and (17) failed to consult with the petitioner regarding the petitioner's direct appeal and to raise appropriate issues on appeal. The petitioner also contends that he received the ineffective assistance of counsel based on the cumulative effect of the errors.

The state contends that the petitioner did not receive the ineffective assistance of counsel. We agree with the state.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for

counsel's professional errors, the result of the proceeding would have been different.” Id. at 694, 104 S. Ct. at 2068. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

When a petitioner contends that his trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. See Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). This is the only way for a petitioner to prove by clear and convincing evidence that “the failure to discover or interview a witness inured to his prejudice” or that the failure to “call the witness to the stand resulted in the denial of critical evidence.” Id. at 757.

A. Failure to Investigate and Present Evidence

The petitioner contends that his attorney's performance was constitutionally deficient because his attorney failed to investigate his case properly and present crucial defense witnesses. He claims that although his attorney hired a private investigator, the attorney did not follow up on the information uncovered by the investigator. He claims that his attorney failed to call Christine McHenry, a crucial alibi witness, to testify at the trial even though he knew of her existence and potentially exculpatory testimony. He claims his attorney also failed to present evidence that “Twenty” was the shooter and that “Twenty,” not the petitioner, drove a white car at the time of the shooting. Finally, the petitioner claims that his attorney failed to present evidence through witnesses who testified for the petitioner at the trial or through other means regarding the fact that the petitioner had short hair at the time of the offense, contrary to the eyewitness statements that the shooter's hair was long. The petitioner contends his attorney's failures prejudiced his defense.

The state claims the petitioner's attorney did not render deficient performance for failing to seek a continuance in order to have Christine McHenry testify because Ms. McHenry, as the trial court noted, was “confused and forgetful” and would not have been a helpful witness at the trial. The state responds that nothing in the post-conviction record preponderates against the trial court's

finding that the petitioner's attorney's performance was not deficient for failing to "pin the murder on 'Twenty.'" The state claims that the only witnesses who would have testified to the petitioner's hair length were his alibi witnesses. It argues that because the jury rejected their alibi testimony it would have equally rejected their testimony as to the petitioner's hair length.

At the post-conviction hearing, Ms. McHenry testified that had she been called, she would have testified that the petitioner was at home on the night of the murder. The trial court found that Ms. McHenry was dazed and confused and that her testimony at the trial would have been merely cumulative to that of the petitioner's mother and sisters. We conclude that the record does not preponderate against the trial court's finding that the petitioner failed to prove prejudice by clear and convincing evidence.

At the post-conviction hearing, the petitioner's attorney testified that he did not pursue the avenue of defense regarding "Twenty" more vigorously because he was focusing on presenting the petitioner's alibi as the main defense. We also note that the petitioner failed to present any evidence at the post-conviction hearing affirmatively linking "Twenty" to the murder and conclude that the petitioner has failed to prove prejudice by clear and convincing evidence.

Concerning the petitioner's hair length, the trial court found the petitioner failed to prove prejudice by clear and convincing evidence because of the fact that the petitioner's evidence concerning his hair would have come from his alibi witnesses, whose testimony the jury rejected. We conclude that the evidence supports the trial court's finding that the petitioner failed to prove prejudice. The petitioner is not entitled to relief on this issue.

B. Failure to Consult Adequately

The petitioner contends his attorney's performance was constitutionally deficient for failing to consult with him adequately. He claims that his attorney's meeting with him ten times before the trial "is inadequate for any trial" The state does not respond to this contention.

At the post-conviction hearing, the petitioner failed to introduce any evidence as to how his attorney's meeting with him only ten times prejudiced his defense. We conclude the petitioner has failed to prove prejudice by clear and convincing evidence. The petitioner is not entitled to relief on this issue.

C. Failure to Determine the Extent of Pamela Johnson's Deal with the State

The petitioner contends his attorney's performance was constitutionally deficient for failing to file a pre-trial motion to discover the extent of the agreement made by Pamela Johnson with the state in exchange for her testimony against the petitioner. The state responds that no deal existed between the state and Pamela Johnson.

At the post-conviction hearing, Assistant District Attorney General Brett Gunn testified that he prosecuted the petitioner and that he made no deal with Pamela Johnson before she testified against the petitioner. He said he only promised to take into consideration her testimony when proceeding with the state's case against her. The trial court determined no deal existed between the state and Pamela Johnson. We disagree and conclude that General Gunn's quid pro quo operated as an effective agreement. However, we conclude the petitioner failed at the post-conviction hearing to show by clear and convincing evidence that the result of his trial would have changed but for his attorney's failure to discover this arrangement. The petitioner has failed to prove prejudice, and he is not entitled to relief on this issue.

D. Failure to File a Motion to Suppress the Identification Procedures

The petitioner contends his attorney's performance was constitutionally deficient for failing to file timely a pretrial motion to suppress the witness' identifying him by picking his picture out of a photograph array. He claims the photograph array was impermissibly suggestive but does not argue why that is so. He also claims that his attorney should have based his motion to suppress on Det. Satterfield's coaching Amelia Patterson. The state responds that the petitioner's trial attorney did file a motion to suppress the identification which the trial court heard and ruled on the day of the trial.

The post-conviction court stated that it ruled on and denied the petitioner's motion to suppress and that because the court ruled on all of the issues raised in the motion, no prejudice inured to the petitioner from his attorney's untimely filing. We conclude the petitioner has failed to show prejudice by clear and convincing evidence how his attorney's untimely filing prejudiced his defense. The petitioner is not entitled to relief on this issue.

E. Agreement to Judge Kurtz's Sitting by Interchange

The petitioner contends his attorney's performance was constitutionally deficient for failing to follow the petitioner's instruction to seek a continuance until Judge Blackburn could return. The petitioner claims his attorney agreed to the interchange, notwithstanding his stated opposition to it. The state contends that the petitioner had no right to contest the interchange of judges.

At the post-conviction hearing, the petitioner failed to introduce any evidence showing how he was prejudiced by the judicial interchange. The petitioner is not entitled to relief on this issue.

F. Failure to Identify the Crime Stoppers Caller

The petitioner contends his attorney's performance was constitutionally deficient for failing to file a pretrial motion to seek the identity of the person who called Crime Stoppers. The state responds that the petitioner failed to prove how learning the identity of the caller would have helped his defense.

The post-conviction court found that the petitioner failed to prove prejudice on this issue because he failed to introduce any evidence showing how the identity of the caller would have helped his defense. We conclude that the record supports the trial court's finding and that the petitioner is not entitled to relief on this issue.

G. Failure to Object to Prejudicial Hearsay

The petitioner contends his attorney's performance was constitutionally deficient for failing to object on hearsay grounds to the testimony of Harold Overton. The petitioner claims that Mr. Overton's testifying as to statements he overheard the petitioner make was "rank hearsay" and overly prejudicial. The state responds that because the statements could have been interpreted as an admission of guilt, they were admissible under Rule 803 (1.2) of the Tennessee Rules of Evidence, and that the petitioner's attorney's performance in failing to object was not deficient.

At the trial, Mr. Overton testified that "[t]here was [sic] about three or four guys that were talking, and then one guy walked up and he said Leon, man, . . . they are looking for you And then he said, like, well, I don't give a fuck, you know, there is more than one Leon . . . and then he said besides that, they don't know my last name[.]" Robins, slip op. at 4. At the post-conviction hearing, the trial court found "that the statements of the petitioner were admissible hearsay. See T.R.E. 803(1.2). The statement by the petitioner was ambiguous but could have been interpreted as indicating consciousness of guilt. It was relevant. T.R.E. 401." Tennessee Rule of Evidence 803 (1.2) provides that "[a] statement offered against a party that is . . . the party's own statement in either an individual or representative capacity" is admissible over a hearsay objection. We conclude that the statements were admissible as party opponent admissions and that the record supports the trial court's finding that the petitioner's attorney's performance was not deficient. The petitioner is not entitled to relief on this issue.

H. Failure to Advise the Court of a Complaint to the Board of Professional Responsibility

The petitioner contends his attorney's performance was constitutionally deficient for failing to advise the trial court before or during the trial that the petitioner had filed a complaint against him with the Board of Professional Responsibility. The state responds that the trial court accredited the testimony of the attorney that he did not remember the petitioner's filing of a complaint against him.

Initially, we note the petitioner fails to allege in his brief how his attorney's failure to bring this matter to the attention of the court prejudiced his defense. We conclude the petitioner has failed to prove prejudice by clear and convincing evidence. The petitioner is not entitled to relief on this issue.

I. Failure to Cross-Examine Witnesses Effectively

The petitioner contends his attorney's performance was constitutionally deficient for failing to cross-examine Pamela Johnson and Amelia Patterson effectively. He claims his attorney failed

to cross-examine Pamela Johnson regarding her motive to lie based upon the fact that she was also under indictment in the case and to cross-examine Amelia Patterson based upon Det. Satterfield's coaching her before her testimony at the preliminary hearing. The state responds that no deal existed between Pamela Johnson and the district attorney's office and that the petitioner was not prejudiced by his attorney's failure to explore Ms. Johnson's motive for lying. The state also contends the petitioner failed to prove Det. Satterfield coached Amelia Patterson.

Initially, we note that at the post-conviction hearing, the petitioner failed to call Amelia Patterson to testify and that Det. Satterfield testified that he did not coach Amelia Patterson. Therefore, we conclude the petitioner has failed to prove by clear and convincing evidence that Det. Satterfield coached Amelia Patterson, that his attorney's performance was deficient, or that he was prejudiced.

Concerning Pamela Johnson, we again conclude the petitioner has failed to show the necessary prejudice resulting from his attorney's failure to cross-examine Ms. Johnson concerning her arrangement with the state. Regarding her motive to lie, the trial court found that the petitioner's attorney's cross-examination on this point could have been more explicit, but it noted that the jury was aware that Ms. Johnson was under indictment for the murder and that it gave an appropriate instruction to the jury about her credibility. We conclude the petitioner has failed to prove by clear and convincing evidence that he was prejudiced, and he is not entitled to relief on this issue.

J. Improperly Admitted Mug Shots

The petitioner contends that his attorney's performance was constitutionally deficient for improperly admitting prior mug shots of the petitioner into evidence and for failing to request a curative instruction. He claims that although he directed the attorney to introduce the pictures in order to contest the witnesses identification of him, the decision whether to introduce such evidence is the exclusive prerogative of the attorney, not the defendant. He claims the pictures allowed the jury to infer he was a repeat offender, resulting in prejudice. The state fails to respond to this argument.

We note the trial court also failed to address this issue in its order dismissing the petition. The record reflects that during the trial the state introduced three mug shots of the petitioner into evidence to show he had worn his hair long in the past. In response, the petitioner's attorney sought to introduce nine other mug shots of the petitioner, showing the petitioner as wearing his hair short. A bench conference ensued, and the petitioner's attorney stated, "This is something my client has demanded that I submit into evidence." The trial court advised the attorney that he did not have to adhere to his client's desire if he thought it was not a good idea to introduce the mug shots. The attorney responded, "Well, it's a good idea."

We conclude the petitioner has failed to prove by clear and convincing evidence that he was prejudiced as a result of his attorney's introducing the mug shots into evidence. Although the introduction of the nine mug shots allowed the jurors to consider that the petitioner had been

previously arrested, the state had already introduced three mug shots which would have allowed the jurors to draw a similar conclusion. Moreover, various witnesses at the trial identified the petitioner as the shooter, and Ms. Johnson testified to the events leading up to the killing. The petitioner is not entitled to relief on this issue.

K. Failure to Present Evidence of Other Suspects

The petitioner contends that his attorney's performance was constitutionally deficient for failing to make an offer of proof to show that "Twenty" was the killer. The state responds that the petitioner has failed to establish prejudice.

At the post-conviction hearing, the petitioner introduced evidence reflecting that "Twenty" drove a white car, had long hair, and was violent. However, the record is devoid of any substantive evidence linking "Twenty" to the killing. We conclude the petitioner has failed to prove by clear and convincing evidence that he was prejudiced by his attorney's failure to put forth an offer of proof that "Twenty" was the killer. The petitioner is not entitled to relief on this issue.

L. Failure to Impeach Detective Satterfield Properly

The petitioner contends his attorney's performance was constitutionally deficient for failing, during his cross-examination of Det. Satterfield, to put forth as an offer of proof the fact that in a previous opinion, this court had concluded that Det. Satterfield manufactured evidence in a different case. The state does not respond to this issue.

Initially, we note the trial court did not address this issue in dismissing the petition. At the post-conviction hearing, Det. Satterfield was asked whether the petitioner's trial attorney had asked him about his involvement in a case where this court found he had manufactured evidence. Det. Satterfield replied that he remembered being asked the question. However, the record reflects that the petitioner's post-conviction attorney never asked Det. Satterfield whether he did, in fact, manufacture evidence in a prior case. We conclude the petitioner has failed to prove by clear and convincing evidence that he was prejudiced by his attorney's failure to preserve this issue. The petitioner is not entitled to relief.

M. Failure to Introduce Detective Satterfield's Coaching a Witness

The petitioner contends his attorney's performance was constitutionally deficient for failing to raise at the trial the issue of Det. Satterfield's coaching of Amelia Patterson at the courthouse before the preliminary hearing. The state contends the petitioner failed to prove that Det. Satterfield coached Amelia Patterson.

We note that at the post-conviction hearing, the petitioner failed to call Amelia Patterson to testify and that Det. Satterfield testified that he did not coach Amelia Patterson. Therefore, we conclude the petitioner has failed to prove by clear and convincing evidence that Det. Satterfield

coached Amelia Patterson, that his attorney's performance was deficient, or that he was prejudiced. The petitioner is not entitled to relief on this issue.

N. Failure to Advise Petitioner Properly of His Right to Testify

The petitioner contends his attorney's performance was constitutionally deficient for failing to advise him properly about his right to testify. He claims that under State v. Momon, 18 S.W.3d 152 (Tenn. 1999), a criminal defendant must personally waive his right to testify after questioning by the trial court. The petitioner claims that his attorney violated the Momon requirements and that he is entitled to a new trial as a result. The state claims that the petitioner's attorney advised him of his right to testify and that even if he was not advised properly, any error would be harmless given that the petitioner's defense was alibi and he had three alibi witnesses.

In Momon, our supreme court mandated certain procedures be employed to ensure that a defendant personally waive his right to testify but stated,

The procedures are prophylactic measures which are not themselves constitutionally required. As such, the procedures adopted herein do not establish a new constitutional rule which must be retroactively applied [M]ere failure to follow these guidelines will not in and of itself support a claim for deprivation of the constitutional right to testify if there is evidence in the record to establish that the right was otherwise personally waived by the defendant.

18 S.W.3d at 163. Momon predated the trial and the appeal in the present case. The trial court accredited the testimony of the attorney over the petitioner and found that the attorney did discuss the petitioner's right to testify with him. We conclude the petitioner has failed to establish any constitutional violation, and he is not entitled to relief on this issue.

O. Failure to Object to an Improper Alibi Instruction

The petitioner contends his attorney's performance was constitutionally deficient for failing to object to the trial court's alibi instruction. The state fails to respond to this issue.

Initially, we note the trial court failed to address this issue in its order dismissing the petition. The record reflects that the trial court gave the following alibi instruction:

The defendant has presented evidence of an alibi in this case. An alibi is defined as evidence which establishes the defendant was not present at the scene of the alleged crime when it [allegedly] occurred. If the defendant was not present when the crime was committed, he or she cannot be guilty. The burden is on the State to prove beyond a reasonable doubt that the defendant was at the scene

of the crime when it was committed. If you find from your consideration of all the evidence that the State has failed to prove beyond a reasonable doubt that the defendant was at the scene of the crime when it was committed, you must find the defendant not guilty. The weight to be given alibi evidence is a question for the jury to decide considering all the facts and circumstances of the case.

(Emphasis Added). The petitioner cites Christian v. State, 555 S.W.2d 863 (Tenn. 1977), and claims that the trial court improperly commented on the weight of the evidence. In Christian, the trial court's alibi instruction concluded, "The law says that the defense of alibi should be received by the jury discreetly and cautiously because it is a defense that can be easily manufactured or fabricated." 555 S.W.2d at 864. Our supreme held that a trial court "should not disparage alibi evidence or instruct the jury to treat it differently from evidence offered on other issues" or "instruct the jury as to any special method of weighing or receiving alibi evidence" Id. at 865. The petitioner claims the trial court violated Christian.

We disagree and conclude the petitioner has misapprehended Christian's applicability to his case. The trial court did not comment on the weight of the evidence in the present case. It merely informed the jury that it was the jury's exclusive prerogative to determine the weight. We conclude the petitioner's attorney was not deficient in failing to object. We also conclude the petitioner has failed to introduce any evidence of how this attorney's failure to object resulted in prejudice. The petitioner is not entitled to relief on this issue.

P. Failure to Request a Jury Instruction

The petitioner claims his attorney's performance was constitutionally deficient for failing to request a jury instruction "on direct and circumstantial evidence." The state responds that the petitioner's attorney's performance was not deficient.

We conclude that the petitioner failed to introduce any evidence at the post-conviction hearing as to how he was prejudiced by his attorney's failure to request a specific instruction "on direct and circumstantial evidence." The petitioner is not entitled to relief on this issue.

Q. Failure to Consult With Petitioner for Appeal

The petitioner contends his attorney's performance was constitutionally deficient for failing to consult with him properly regarding his appeal. He claims that his attorney failed to raise issues on appeal that he requested and that he was prejudiced as a result. The state does not respond to this issue.

Initially, we note the trial court did not address this issue in dismissing the petition. In any event, we note the petitioner's brief is devoid of what issues he requested the attorney to address on direct appeal. It is also devoid of any allegation of prejudice. However, at the post-conviction

hearing, the petitioner testified that one issue he wanted his attorney to raise on appeal dealt with the judicial interchange.

At the post-conviction hearing, the petitioner presented no evidence as to how Judge Kurtz's sitting by interchange for Judge Blackburn prejudiced his defense. We conclude that the petitioner has failed to establish the necessary prejudice and that he is not entitled to relief on this issue.

R. Cumulative Errors

The petitioner contends his attorney's performance was constitutionally deficient based upon the cumulative effect of the errors. The state does not respond to this issue. We conclude the petitioner's attorney did not afford him the ineffective assistance of counsel based on any single alleged error or the cumulative effect thereof. The petitioner is not entitled to relief on this issue.

II. JUDGE SITTING BY INTERCHANGE

The petitioner contends that because nothing in the record supported Judge Kurtz's sitting by interchange for Judge Blackburn, his right to a fair trial was violated. The state contends that orderly interchange does not affect jurisdiction.

Failure to present a ground for relief on direct appeal constitutes waiver absent certain circumstances inapplicable to the petitioner's case. See T.C.A. § 40-30-106(g). We conclude the petitioner has waived this issue for failing to present it on direct appeal.

III. MOTION TO WITHDRAW

The petitioner contends that despite his informing the trial court of his problems with his attorney, the trial court still denied his attorney's motion to withdraw. He claims this denied him the effective assistance of counsel. The state claims the petitioner has waived this issue for failing to raise it on direct appeal. We agree with the state.

Failure to present a ground for relief on direct appeal constitutes waiver absent certain circumstances inapplicable to the petitioner's case. See T.C.A. § 40-30-106(g). We conclude the petitioner has waived this issue.

IV. PETITIONER'S RIGHT TO TESTIFY

The petitioner contends that the trial court denied him his right to testify in his own defense in violation of the constitutional requirements set forth in Momon v. State, 18 S.W.3d 152 (Tenn. 1999). The state contends the petitioner has waived this issue by failing to present it on direct appeal.

Initially, we note that the procedural requirements set forth in Momon would afford the petitioner no relief in this case. 18 S.W.3d at 162-63 (holding “that neither the right to testify discussed herein, nor the procedural protections adopted to preserve that right are new constitutional rules which must be retroactively applied”). In any event, failure to present a ground for relief on direct appeal constitutes waiver absent certain circumstances inapplicable to the petitioner’s case. See T.C.A. § 40-30-106(g). We conclude the petitioner has waived this issue.

V. HEARSAY

The petitioner contends that the trial court erred in admitting into evidence the hearsay statements of the petitioner as testified to by Harold Overton. The state contends the petitioner has waived this issue for failing to present it on direct appeal.

Failure to present a ground for relief on direct appeal constitutes waiver absent certain circumstances inapplicable to the petitioner’s case. See T.C.A. § 40-30-106(g). We conclude the petitioner has waived this issue.

VI. PROSECUTORIAL MISCONDUCT

The petitioner contends that the state committed prosecutorial misconduct by seeking out and repeatedly admitting hearsay testimony. The state contends the petitioner has waived this issue by failing to present it on direct appeal.

Failure to present a ground for relief on direct appeal constitutes waiver absent certain circumstances inapplicable to the petitioner’s case. See T.C.A. § 40-30-106(g). We conclude the petitioner has waived this issue.

VII. JURY INSTRUCTIONS

The petitioner contends the trial court violated his right to trial by jury by improperly instructing the jury on the law applicable to his case. The state contends the petitioner has waived this issue by failing to present it on direct appeal.

Failure to present a ground for relief on direct appeal constitutes waiver absent certain circumstances inapplicable to the petitioner’s case. See T.C.A. § 40-30-106(g). We conclude the petitioner has waived this issue.

CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the trial court’s dismissal of the petition for post-conviction relief.

JOSEPH M. TIPTON, JUDGE